

13
No. 10068

United States

Circuit Court of Appeals

For the Ninth Circuit.

Vol
2297

GEORGE M. STOUT, State Liquor Administrator
of the State of California, and LUTHER M.
SAY, Chief Liquor Control Officer of District
D of the State Board of Equalization of the
State of California,

Appellants,

vs.

BERT M. GREEN, Trustee of the Estate of
George Hugo Malter, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Southern District of California,
Northern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Northern Division.

No. 5186 In Bankruptcy

In the Matter of

GEORGE HUGO MALTER,

Bankrupt.

CERTIFICATE AND REPORT OF REFEREE
ON PETITION OF GEORGE M. STOUT,
AS STATE LIQUOR ADMINISTRATOR,
AND LUTHER M. SAY, AS CHIEF
LIQUOR CONTROL OFFICER OF DIS-
TRICT D OF THE STATE BOARD OF
EQUALIZATION, TO REVIEW ORDER OF
REFEREE.

To the Honorable Judges of the United States District Court, for the Southern District of California:

I, Samuel F. Hollins, one of the referees in bankruptcy of this court and the referee in bankruptcy in charge of this proceeding, respectfully certify and report:

That on the 18th day of April, 1940, there was filed on behalf of the trustee herein the following verified

PETITION FOR A RESTRAINING ORDER
AND ORDER TO SHOW CAUSE

directed to George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief

Liquor Control Officer of the State of California, for [2] District D thereof, as follows:

“The petition of Bert M. Green, Trustee in Bankruptcy of George Hugo Malter, respectfully shows:

“That on or about the 12th day of August, 1939, the above named bankrupt filed a debtor’s petition under Section 322 of the Bankruptcy Act and proceedings thereunder were referred to Samuel F. Hollins, one of the Referees in Bankruptcy of the above entitled court;

“That thereafter, and on or about the 18th day of November, 1939, the above named debtor was duly adjudicated a bankrupt and that thereafter and on the 22nd day of November, 1939, petitioner was duly appointed the trustee of the bankrupt’s estate and effects; that he thereupon qualified as such and your petitioner ever since has been and still is the duly qualified and acting trustee of said estate.

“That petitioner, as such Trustee, has taken possession of the assets of said bankrupt, which consist of approximately five (5) acres of land, and equipment designed for the manufacture of brandy from grapes. That among said equipment there is a dismantled still designed for the distillation of brandy from fruit juices. That petitioner has not operated said still or carried on any business whatsoever; that he has preserved said assets, including said still, as an asset of said estate and has kept said property

under his custody at all times. That petitioner has never had any money in his hands whatsoever.

“That prior to the filing of the petition in this proceeding various creditors have secured, through proceedings in the State Courts, liens by judicial process against the property of said bankrupt which were more than four months old at the date of the filing of these proceedings. That said claims aggregate approximately the sum of \$9,201.96.

“That there is a claim filed by the Collector of Internal Revenue of the United States in the amount of \$710.73, [3] which claim sets forth the claim of a statutory lien of the Collector of Internal Revenue against the assets of the bankrupt and alleges that said lien arises out of unpaid alcohol taxes.

“That George M. Stout as Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the California State Board of Equalization, in charge of said District in which said dismantled still is located, although they have filed no claim in these proceedings have demanded that your petitioner apply for and obtain a license from the State of California under the Alcohol Beverage Control Act to possess such still which is an asset of the above entitled bankrupt estate, and to pay therefor the sum of \$10.00 license fee thereunto pertain-

ing. That your petitioner has no funds belonging to said estate and has not operated said still and does not intend to operate said still and said still cannot be operated without expenditure of substantial funds in rebuilding said still.

“That by reason of the failure of the petitioner hereunder to pay said \$10.00 and apply for said license said George M. Stout, as said Liquor Administrator, and said Luther M. Say, as Chief Liquor Control Officer, have threatened to have a felony complaint issued against petitioner for failure to comply with said Alcohol Beverage Control Act, and have interviewed the District Attorney of Fresno County to that end and have threatened and are now threatening to seize said still and commence forfeiture proceedings against said still and to destroy said still.

“That said still is a valuable asset of said estate and that petitioner is diligently attempting to liquidate said estate, clear up the liens and dispose of said assets in accordance with the provisions of the Bankruptcy Law of the United States, and that said threatened action of said State [4] Liquor Administrator and Chief Liquor Control Officer will cause irreparable loss to the estate of the bankrupt and will greatly hamper petitioner in the orderly administration of the estate of said bankrupt.

“Wherefore, your petitioner prays that a

Restraining Order be issued restraining George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer of the State of California, for District D thereof, and their agents and employees from seizing said still of the bankrupt, or taking any steps whatsoever pertaining to such seizure, and from interfering with Petitioner's possession and control of said still, and the orderly administration of the bankrupt's estate; and that an order to show cause be issued on this petition ordering said George M. Stout and said Luther M. Say to show cause why said restraining order should not be made permanent.

“BERT M. GREEN
Petitioner”

(Verification omitted for sake of brevity.)

Based on said petition the following

**RESTRAINING ORDER AND ORDER
TO SHOW CAUSE**

was issued on April 18, 1940:

“At Fresno, in said District, on the 18th day of April, 1940.

“Upon reading the verified petition of Bert M. Green, Trustee in Bankruptcy of George Hugo Malter, the above named bankrupt, duly filed herein; upon all the other papers filed and proceedings had herein; and upon motion of

Frank C. Lerrigo, attorney for said trustee, and good cause appearing therefor,

“It Is Ordered that George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the California State Board of Equalization, and each and every person acting for [5] and in aid and assistance of the said George M. Stout as California State Liquor Administrator, and Luther M. Say as Chief Liquor Control Officer of District D of the State of California, and their agents and employees, be, and each of them is hereby restrained until the hearing of this order, and until the further order of this Court from seizing that certain still for the distillation of spirituous liquors, now located on the premises, belonging to the estate of George Hugo Malter, a bankrupt, the said premises being described as follows: Real property in the County of Fresno, State of California, described as follows:

The East half of Lot 31 of Easterby Rancho, according to the map thereof recorded June 24, 1880 in Plat Book 2 at page 6, in the office of the County Recorder of said County, and which premises and the said still located thereon are now under the jurisdiction and control of Bert M. Green, as Trustee in Bankruptcy, for George Hugo Malter, bankrupt, and the said George M. Stout and Luther M. Say,

their agents and employees are further restrained from interfering in any way with the possession and control of said still by Bert M. Green, as such Trustee in Bankruptcy, and from interfering in any way with the orderly administration of the estate of said bankrupt until the further order of this Court.

“It Is Further Ordered, that George M. Stout as such State Liquor Administrator, and the said Luther M. Say, as Chief Liquor Control Officer of District D of the State of California, shall appear before this Court at the courtroom located in the Pacific Southwest Building, at Room 710 thereof, on the 11 day of May, 1940, at nine-thirty o'clock A. M. of said day, then and there to show cause if any they have, why the said restraining order shall not continue in full force and effect, and why such other and further order should not be made as may be proper in the premises. [6]

“Dated at Fresno, California, this 18th day of April, 1940.

“SAMUEL F. HOLLINS

“Referee in Bankruptcy of
said Court.”

Thereafter and on May 11, 1940, there was filed on behalf of said respondents George M. Stout and Luther M. Say, the following

MOTION TO DISMISS:

“George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of the State of California for District D thereof, of the State Board of Equalization of the State of California, in response to the Order to Show Cause issued out of the above entitled Court in the above entitled matter and directed to them and each of them, hereby move to dismiss the petition of Bert M. Green, Trustee in Bankruptcy in the above entitled matter, and the Order to Show Cause issued April 18, 1940, by the Honorable Samuel F. Hollins, Referee in Bankruptcy of said Court, upon the following grounds:

I.

“That said petition does not, nor does any part thereof state a cause for relief as against the movants herein, or either of them.

“EARL WARREN,

Attorney General of the State
of California

“By J. ALBERT HUTCHINSON

“Deputy Attorney General

“Attorneys for George M. Stout and
Luther M. Say.”

The respondents filed no answer to the trustee's petition at any time and in their oral and written arguments argued that the motion to dismiss should be dismissed because of lack of jurisdiction of the Referee.

The Trustee's counsel on the 11th day of May, 1940, filed a paper termed "Stipulation", a copy of which is attached to the Petition for Review of Order of Referee attached hereto, which [7] purported to set forth some of the facts. Inasmuch as the respondents filed no answer and the stipulation appeared incomplete and in the opinion of the Referee the Collector of Internal Revenue was a necessary party to a full determination of the matter on the merits, he has taken the position with the respondents' counsel that they were submitting the matter on the motion to dismiss only.

Thereafter, and on May 11, 1940, the matter was argued orally by the respondents, through their attorneys, and the trustee, through his attorney, and thereafter submitted on written briefs, and on October 26, 1940, the Referee made an

ORDER DENYING THE MOTION
TO DISMISS,

as follows:

"The Trustee having filed herein on April 18, 1940, his petition for Restraining Order; and on said date an Order to Show Cause and Restraining Order was issued directed to George M. Stout, California State Liquor Administra-

tor, and Luther M. Say, as Chief Liquor Control Officer of California State Board of Equalization, restraining said officers from seizing a certain still for the distillation of spirituous liquors, which still was under the jurisdiction and control of the Trustee, and the said officers having appeared herein on May 11, 1940, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and moved the Court to dismiss the petition of the Trustee and the Order to Show Cause on the grounds 'that said petition does not nor does any part thereof state the cause for relief as against the movants or either of them'; and the matter having been argued in open court and having been submitted on briefs and the Court having considered the same and being fully advised in the premises and being satisfied that the Court has jurisdiction of the subject matter and the still in question, and that the matter should be presented on the merits after giving notice to all interested [8] parties including the United States of America who claims a lien on the still for distilled spirits taxes,

"It is therefore ordered, adjudged and decreed that the Motion to Dismiss be and the same is hereby denied.

"It is further ordered, adjudged and decreed that the Restraining Order heretofore entered in the above entitled matter be and the same

is hereby continued in full force and effect until the matter is presented on the merits and until further order of the Court.

“Dated: October 26, 1940.

“SAMUEL F. HOLLINS

“Referee in Bankruptcy”

Simultaneously with the filing of said order the Referee filed the following

MEMORANDUM OPINION:

“The petition of the Trustee in Bankruptcy for an order to show cause and restraining order sets forth that since the 22nd day of November, 1939, he has been the duly appointed, qualified and acting Trustee of the above named bankrupt; that he took possession of the assets of the bankrupt; that among the assets was a dismantled brandy still; that he has not operated or been authorized to operate the still, or carried on any business whatsoever; that he had, prior to the date of filing of this petition been preserving the assets, including the still; that he has never had any cash at all; that the Collector of Internal Revenue has filed a claim in the sum of \$710.73 wherein a lien was claimed upon the assets because of unpaid alcohol taxes; that George M. Stout, California State Liquor Administrator, and Luther M. Say, a Chief Liquor Control Officer of the California State Board of Equalization, without ap-

pearing in the bankruptcy court and although no claims were filed in the bankruptcy court, did make a demand upon the Trustee to pay a still license fee; the [9] trustee being without funds had not complied with the demands; that the officers had threatened to have a felony complaint issued against the trustee for alleged possession of a dismantled still without a permit in violation of the California Alcohol Beverage Control Act, (Statutes of 1935, Chapter 330 as amended), and had threatened to seize the still; that the still was a valuable asset of the estate and that the Trustee was diligently attempting to liquidate the estate by disposing of the assets in accordance with the Bankruptcy Act, and that the threatened action of the State Officers would cause irreparable loss to the estate and hamper the trustee in the administration of the estate.

“A restraining order and order to show cause was issued on the respondents, returnable before the Bankruptcy Court on May 11, 1940.

“On May 11, 1940, the State Officers appeared and moved to dismiss the restraining order on the ground that,

‘said petition does not nor does any part thereof state a cause for relief as against the movants herein or either of them.’

A motion to dismiss admits all the well pleaded allegations of the petition.

“The question raised is whether a bankruptcy court may under the allegations of the petition restrain State Officers, who file no claim in the bankruptcy court and have not asked the bankruptcy court’s permission to confiscate or commence forfeiture proceedings against a dismantled still which the bankrupt lawfully owned, from seizing such an asset of a bankrupt estate.

“In the case of *Isaacs vs. Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 Sup. Ct. Rep. 270, Mr. Justice Roberts said,

‘Upon adjudication, title to the bankrupt’s [10] property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson v. Howard*, 229 U. S. 254, 259, 260, 33 S. Ct. 854, 57 L. Ed. 1174; *Wells & Co. v. Sharp* (C. C. A.) 208 F. 393; *Galbraith v. Robson-Hilliard Grocery Co.* (C. C. A.) 216 F. 842. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt

estate. It may order a sale of real estate lying outside of the district. *Robertson v. Howard*, *supra*; *In re Wilka* (D. C.) 131 F. 1004. When this jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts. *White v. Schloerb*, 178 U. S. 542, 20 S. Ct. 1007, 44 L. Ed. 1183; *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327; *Dayton v. Stanard*, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190. This is but an application of the well-recognized rule that, when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession, and control of the property.'

“We are dealing with the acknowledged duty and power of courts to protect property in their custody. As Chief Justice Fuller stated in the case of *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 Law Ed. 689, at 695,

‘No rule is better settled that that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned,

and cannot be disturbed without the leave of the court; and, that if any person without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor.'

"In *White vs. Schloerb*, 178 U. S. 542, 44 Law Ed. 1183, Mr. Justice Gray, speaking for the Court, said:

'At the date of this adjudication in bankruptcy by the district court of the United States, the goods were in the store of the bankrupts and in their actual possession, and were claimed by them as their property. On the same date that court referred the case to a referee in [11] bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.'

"A referee in Bankruptcy, after reference, can do everything that a judge can do, except, adjudicate voluntary petitions (except in absence of the judge); commit for contempt; hear jury trial when demanded; extradite a bankrupt; enjoin a court; transfer cases and designate newspapers.

Collier on Bankruptcy, 14 Ed. Vol. 2, p. 517.

“It is admitted that a claim filed in this matter establishes that the United States claims \$710.73 unpaid distilled spirits taxes. The revenue law makes that a lien against the still. Whether the respondent officers could seize the still and prosecute forfeiture proceedings against it and eliminate the claim of the government we are not prepared to say. Section 3251 of Revised Statutes provides,

‘Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid. (R. S. 3251; Acts July 20, 1868, 1, 4. 15 Stat. 125, 126; June 6, 1872, c. 315, 12, 17 Stat. 238.)’

“The fact that they claim such a lien on the still that the bankrupt owned and lawfully possessed and the title to which is now vested in the trustee by operation of law (Section 70 of the Bankruptcy Act) supplies the reason for

the rule requiring the respondents to come into the bankruptcy court by whatever form of [12] petition they deem advisable so that their rights, the rights of the United States government and all other parties may be adjudicated. If respondents are dissatisfied with any decision, economical and speedy methods of review and appeal are afforded by the act of Congress.

“If the law was as respondents contend, efficient administration of the bankruptcy law would be impossible.

“Respondents have argued, and we think correctly so, that the state law in question is a police regulation. They have argued that it is the duty of the state officers to inspect all stills including the still in question. The bankruptcy records are public records, the statutes make it a penal offense for a referee to refuse to permit inspection during reasonable hours. The trustee in the instant case is a man of unquestioned integrity; he is bonded; incidentally, he happens to be a deputy district attorney of the County of Fresno, State of California, and there is no question but what he will cooperate with the respondent officers and permit inspection of the res in question at all times. It will be presumed that he has done his duty and kept the still safely stored.

“Respondents question the jurisdiction of the bankruptcy court to issue the restraining order and yet it is admitted the still has been under

the jurisdiction of the bankruptcy court since the date of the filing of the petition. Thus the bankruptcy court has had the actual possession of the res at all times and under the cases of *Harrison vs. Chamberlain*, 271 U. S. 191, and *Taubell-Scott-Kitzmiller Co. vs. Fox*, 264 U. S. 426; 68 Law Ed. 770; 44 S. Ct. 396; 2 Am. B. R. (NS) 912, the bankruptcy court has summary jurisdiction over the res.

“If other authority were necessary, the case of *In re [13] Hornstein*, 122 Fed. 266, at page 271, is one of many that could be cited. In that case the court said:

‘The court has no hesitation in holding that express power is given by the Act of Congress to Courts of Bankruptcy to enjoin all persons within its jurisdiction, whether litigant in a state court or elsewhere, from doing any act which will interfere with or prevent the due administration of the Bankruptcy Act.’

“Respondents have asked no affirmative relief. They filed no process in the bankruptcy court wherein the rights of respondents, the United States Government and all parties might be brought before the court and considered. They only move to dismiss. We think that it follows that the restraining order should be continued in force until the further order of the court, reserving to the respondents the right

at any time to file in the bankruptcy court whatever petition or other process they deem advisable, but until they do, it is clear that the bankruptcy court has exclusive jurisdiction of the res. The motion to dismiss is denied.

“Exception allowed to the respondents. Counsel for trustee to prepare appropriate orders.”

Thereafter and on May 7, 1941, George M. Stout, et al, filed an

ANSWER AND PETITION FOR DELIVERY OF POSSESSION OF THE STILL.

Said Answer was verified on December 12, 1940, and said Answer and Petition reads as follows:

“Now come George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization of said state, and answer and petition of Bert M. Green, trustee in the above-entitled action, dated April 18, 1940, for restraining order; and for answer thereto admit, deny and aver as follows: [14]

I.

“Answering respondents have no knowledge or information sufficient to enable them to form a belief concerning the truth or falsity of the matters set forth and alleged in said petition on pages 1 and 2 thereof, to and including line 18 of said last-numbered page, and that por-

tion of said petition appearing on page 3 commencing with line 10 through line 19 on said last-numbered page, and placing their answer upon the ground that they have no such knowledge, information or belief, deny conjunctively and disjunctively, generally and specifically, each and every, all and singular, the allegations contained in said portions of said petition, and each of said allegations.

II.

“Answering respondents admit the allegations contained in said petition commencing with line 19 on page 2 through line 10 on page 3, save and except that statement contained on page 2 thereof commencing on line 28, and reading as follows:

‘That your petitioner has no funds belonging to said estate and has not operated said still and does not intend to operate said still and said still cannot be operated without expenditure of substantial funds in rebuilding said still.’——

concerning the truth or falsity of which quoted statement answering respondents have no knowledge or information sufficient to form a belief, and placing their answer upon that ground, answering respondents deny conjunctively and disjunctively, generally and specifically, each and every, all and singular, the alle-

gations and statements contained in said quoted statement of said petition.

* * *

“Further answering said petition, and as and for a separate answer thereto, and as and for a petition and claim on behalf of the People of the State of California, answering [15] respondents admit, deny and aver as follows:

I.

“That the still described in said petition of Bert M. Green and dated April 18, 1940, reference to which is hereby made, and which is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length, at all times therein and herein mentioned has been and now is an alcoholic beverage still; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California; that said Bert M. Green has not applied for nor received, and does not hold, any license or permit of the said State Board of Equalization or of any other officer of the State of California permitting him to possess said still; that said still has been at all of said times located within the State of California and is now within said state.

II.

“That by reason of the facts alleged in said petition and herein, said still has been forfeited

to the State of California by virtue of and pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes 1935, Chapter 330, as amended); that it is the duty of answering respondents to seize and take possession of stills and other property forfeited to the State of California by virtue of said Act, and to hold the same for the purpose of such forfeitures, and specifically that it is the duty of answering respondents to seize and take possession of said still pursuant to said Act, and to thereafter cause the commencement of an action in the appropriate courts of the State of California for the confirmation of said forfeiture by the appropriate officers of the State of California.

“Wherefore, answering respondents pray that the [16] restraining order and injunction herein sought by said Bert M. Green, trustee in the above-entitled proceeding, be denied; that the temporary restraining order of the referee made and executed herein on the 18th day of April, 1940, restraining answering respondents from seizing said still and interfering with the possession and control of said still by said Bert M. Green until further order of said court, and that certain order dated October 26, 1940, by said referee, continuing said restraining order of April 18, 1940 in full force and effect until further order of the court, be recalled, annulled and set aside; that Bert M. Green,

trustee, take nothing by reason of his said petition, or otherwise; that answering respondents herein be given possession of said still as required by law, for the purposes of said statutes of the State of California; and that the court make and enter its order releasing to answering respondents said still, and directing said trustee to deliver possession of the same to them for the purposes of said statutes, as aforesaid, with leave to answering respondents and other appropriate officers of the State of California to proceed pursuant to the provisions of the statutes of said state.

“EARL WARREN

Attorney General of the
State of California

“J. ALBERT HUTCHINSON

Deputy Attorney General

“Attorneys for George M.
Stout and Luther M. Say.”

(Verification omitted for sake of brevity)

Thereafter and on May 7, 1941, the Trustee filed his

ANSWER TO THE PETITION OF STOUT, et al,
which said answer reads as follows:

“Now comes Bert M. Green, Trustee of the above named bankrupt and answers the petition of George M. Stout and [17] Luther M. Say for release and delivery of possession of

a certain distilled spirits still and for an answer thereto, admits, denies and alleges as follows, to wit:

I.

“Bert M. Green, as said Trustee denies generally and specifically, conjunctively and disjunctively each and every, all and singular the allegations contained in said petition, not in Trustee’s petition for restraining order and injunction, and in that certain stipulation by the parties hereto, dated May 11th, 1940, expressly admitted to be true.

“As and for a separate, distinct and affirmative defense to the said claim and petition of Luther M. Say and George M. Stout, Bert M. Green, as trustee in bankruptcy alleges as follows, towit:

I.

“That the said Bert M. Green, as said trustee failed and refused to procure a still license as of May the 11th, 1940, the date of the above referred to stipulation under an honest mistake of law, and since that time has duly applied for a still license from the State of California authorizing him to possess the said still, and has tendered the legal fee required for the said still license; that the said Bert M. Green is a fit and proper person to receive a still license and the premises upon which said still is located are proper premises for the location of a

still; that the State Board of Equalization has not acted on the application of the said Bert M. Green, said trustee, for a still license; that the said Bert M. Green has complied with all the laws of the State of California, concerning the application for a still license, and by reason of the said application and by reason of the right of said Bert M. Green to have a still license, the said still is legally possessed [18] by the said Bert M. Green.

“Wherefore, the said Bert M. Green prays that the injunction and restraining order issued by the above-entitled court, restraining and enjoining George M. Stout and Luther M. Say from doing any act to interfere with the possession of said still license may continue in full force and effect, and that the petition and claim of George M. Stout and Luther M. Say for the possession and seizure and forfeiture of said still be dismissed.

“BERT M. GREEN

Petitioner.

“FRANK C. LERRIGO

“Attorney for Petitioner”

(Verification omitted for sake of brevity)

That thereafter and on May 24, 1941, a further hearing was held upon the petition for the restraining order, the order to show cause and the answer and petition of Stout, et al, at which hearing oral testimony was offered covering the good character

of the trustee and the trustee testified concerning his failure to apply for a license when the demand was first made upon him, because he had no funds whatsoever and also because his attorney advised him that in his opinion the law did not require him to do so but suggested as a practical matter that the trustee borrow the \$10.00 or put it up himself. The Trustee in this matter of practical administration chose to rely on his counsel's view of the law rather than upon his counsel's suggestion as to practical administration. That on or about the 11th day of December, 1940, the trustee filed an application with the State Board of Equalization on a form furnished by it and filled it in in the appropriate spaces and transmitted the same with a cashier's check for \$10.00 to the State Board of Equalization [19] applying for a license upon said still and that no action either granting or denying his application had been taken by the State Board of Equalization.

It was then agreed by counsel for the trustee and counsel for Stout, et al, that certain stipulations would be written up and submitted in evidence within a short time. That thereafter and on June 10, 1941, a

STIPULATION OF FACTS

was filed, reading as follows:

“It is hereby stipulated and agreed, by and between George M. Stout, California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, of District ‘D’

of the California State Board of Equalization, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and Bert M. Green, as Trustee in Bankruptcy for George Hugo Malter, Bankrupt, by Frank C. Lerrigo, his attorney, that the following related facts are true and correct and shall be considered as evidence in the hearing of the petition of Bert M. Green, Trustee in Bankruptcy, for George Hugo Malter, Bankrupt, for a Restraining Order restraining George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, from seizing a certain still in possession of Bert M. Green, as said Trustee in Bankruptcy for George Hugo Malter, said facts being as follows, to wit:

That on or about August 12th, 1939, George Hugo Malter was the owner and possessor of a certain still for the distillation of spirituous liquors; that at said time said George Hugo Malter was not the owner and holder of a license from the State of California under the *provisions* (provisions) of the alcoholic beverage control act, Statutes of 1935, Chapter 330, as amended, permitting him to own, possess and operate said still, his said license having expired on June 30th, 1939, and [20] at the time of the threatened seizure referred to in the petition herein.

“That on the 12th day of August, 1939, said

George Hugo Malter filed a debtor's petition in the above entitled court under the provisions of Section 322 of the Bankruptcy Act of the United States; that thereafter on November 18th, 1939, said George Hugo Malter was adjudicated a bankrupt by the United States District Court, Southern District of California; that on or about November 22nd, 1939, Bert M. Green was duly appointed Trustee in Bankruptcy of the estate of George Hugo Malter, Bankrupt, and thereafter qualified as such Trustee and ever since such time has been and now is the duly appointed, qualified and acting Trustee in bankruptcy for the Estate of George Hugo Malter, Bankrupt;

“That as such Trustee, said Bert M. Green has come into the possession of said still, owned by the said bankrupt at the time of the filing of his petition in bankruptcy; that said still is dismantled and has not been operated by said Trustee, nor does said Trustee contemplate the operation of said still; that Bert M. Green, as such Trustee refused to apply for a license to possess or operate said still until on or about December 11th, 1940, at which time he did apply for said still license, and said application has not been granted or denied by the State Board of Equalization of the State of California; that the said Trustee owns and possesses said still only in his capacity as Trustee in Bankruptcy of the Estate of George Hugo Malter, Bankrupt;

“That by reason of the refusal of Bert M. Green, as such Trustee to apply for and receive the said license from the State of California under the provisions of the said Alcohol Beverage Control Act, George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control [21] Officer for District ‘D’ of the State of California Board of Equalization have threatened and are now threatening to seize said still under the forfeiture provisions of the said Alcohol Beverage Control Act of the State of California, and to remove the said still from the possession and control of Bert M. Green, as said Trustee in Bankruptcy, and the Bankruptcy Court of the United States.

“Dated at Fresno, California, this 7th day of June, 1941.

“EARL WARREN,

Attorney General

By J. ALBERT HUTCHINSON
Attorney for George M. Stout,
California State Liquor Administrator, and Luther M. Say,
Chief Liquor Control Officer, of
District ‘D’ of the California
State Board of Equalization.

“FRANK C. LERRIGO

Attorney for Bert M. Green, Trustee in Bankruptcy.”

Certain letters exchanged between the trustee's attorney and attorney for Stout, et al, were by stipulation admitted in evidence after the hearing.

After counsel representing the interested parties had submitted the matter the following

ORDER ON THE TRUSTEE'S PETITION FOR
RESTRAINING ORDER, AND STOUT'S
PETITION FOR LEAVE TO COMMENCE
FORFEITURE PROCEEDINGS

was filed in said bankruptcy proceeding.

“At Fresno, California, in said District, on the 12th day of June, 1941.

“Upon the petition of Bert M. Green, Trustee for restraining order and order to show cause filed herein on April 14, 1940, and the answer of George M. Stout and Luther M. Say, and petition of said Stout, et al, for release and delivery of possession of a still, filed herein on May 7, 1941, upon the bankruptcy petition, the order of adjudication, and upon all other [22] papers and proceedings had herein, and upon due consideration of the testimony of the witnesses and other evidence, and after hearing Frank C. Lerrigo, attorney for the Trustee, and J. Albert Hutchinson, deputy attorney general, in opposition to the trustee's petition and in support of the petition of George M. Stout, et al, for the release and delivery of possession of a still, the Referee hereby finds that on or about August 12, 1939, the above named bank-

rupt was the owner and possessor of a dismantled still for the distillation of liquor; that on August 12, 1939, the above named bankrupt filed a debtor's petition under the provisions of Section 322 of the Bankruptcy Act; that thereafter and on November 18, 1939, Malter was adjudicated a bankrupt and on November 22, 1939, Green was appointed trustee and he thereafter qualified as such trustee and has continued to act as such trustee and as such came into the possession of said dismantled still; that said trustee has neither operated or has he contemplated the operation of said still;

“That on or about the 22nd day of January, 1940, Deputy Attorney General J. Albert Hutchinson requested of the trustee's counsel that the trustee apply for a license with the State Board of Equalization; that at said time and for a long time thereafter the trustee was absolutely without any funds whatsoever;

“That all of the allegations of the trustee's petition for restraining order filed herein on April 18, 1940, are true; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California;

“That thereafter, said trustee having converted some of the assets into money, on or about the 11th day of December, 1940, made written application on forms provided by the State Board of Equalization of the State of

California for a license on said [23] still and accompanied said application with a certified check in the proper amount; that said trustee is a person of good reputation; that although said State Board of Equalization has had said application and said certified check for more than five months they have neither granted or denied said application.

“Now, upon motion of Frank C. Lerrigo, Esq., attorney for said Trustee, it is

“Ordered that the prayer of said trustee’s petition be and the same is hereby granted, and said temporary restraining order is hereby continued in force and effect until action is taken by the State Board of Equalization upon the application of the trustee for a license, and the petition of respondents Stout, et al, is hereby denied until action is taken by the State Board of Equalization upon the application of the trustee herein for a license, and until the further order of the Court. Jurisdiction of the Referee is hereby retained to entertain pending or future petitions in the premises, after action by the State Board of Equalization upon the trustee’s application for a license herein.

“SAMUEL F. HOLLINS

Referee in Bankruptcy.”

Thereafter and on June 21, 1941, there was filed on behalf of Stout, et al, a Petition for Review of the Order of the Referee, original of which, together

with exhibits, is attached hereto and by express reference made a part hereof.

Questions Presented

There is but one question presented on this petition for review, viz.,

Has this court jurisdiction to restrain the respondents from interfering with the assets of the bankrupt estate, and confiscating and forfeiting assets outside of the [24] bankruptcy court, when the United States claims a distilled spirits tax lien on the still, which accrued prior to the State's alleged right of forfeiture, in excess of the appraised value thereof, and when the trustee's application for a license has neither been granted nor denied?

Discussion by and Opinion of Referee

If the district court had the power to restrain respondents under the facts, then the referee has the same power as the district judge.

See *Colliers on Bankruptcy*, 14 Ed. 517; 14 *Journal Nat. Assn. of Referees*, Page 17.

Section 3251, Revised Statutes, provides "The tax shall be a first lien * * * on these stills * * * from the time said spirits are in existence * * * until the tax is paid." It would seem that the lien of the Federal Government is prior in time and prior in right to the State's rights in the still. Stout's petition for permission to commence forfeiture proceedings, nor the Trustee's petition, nor any other proc-

ess has yet brought before the Court the Collector of Internal Revenue of the proper district as the appropriate representative of the United States to give him as such representative of the United States his day in Court and permit him to be heard on the question as to whether the State has a right to commence forfeiture proceedings against property upon which the Government's lien is apparently first.

Summary of the Evidence

The evidence showed that Green, the trustee, was appointed Trustee in the above matter on November 22, 1939; that the proceedings were commenced on or about the 12th day of August, 1939, and that the Trustee, upon his qualification came into possession [25] of a dismantled still.

The still has not been operated by the trustee and the trustee never contemplated the operation of the still; he refused to apply for a license to possess or operate the still until about December 11, 1940, at which time he filed an application on the usual application form and submitted it with a certified check for \$10.00 to the State Board of Equalization.

That the trustee was informed by his attorney that state officers had demanded that he apply for a license and had talked about filing a felony complaint against the trustee some time after he had qualified as trustee but he did not apply for a license because he had no money on hand belonging

to the estate and also because his attorney advised him that in his opinion, since he was not operating the still, it was not necessary for him to secure a license. That thereafter, and on or about the 11th day of December, 1940, his attorney advised him that while he did not think it was necessary to apply for a license but that in the attorney's opinion it would save time and trouble and avoid unpleasantness if he would apply for a license; that the trustee then had money in his possession and he did apply for the license, but although several months had passed the State Board of Equalization had never acted on his application at all.

The bankrupt's license expired on June 30, 1939, but the trustee did not know the license had not been renewed. The trustee stated he did not desire to co-mingle funds of his own with the funds of the bankrupt estate and that he would have resigned as trustee rather than co-mingle funds.

The evidence also showed that Trustee Green held a similar position as trustee in the matter of the Kearney Winery and that a still was contained among the assets of that estate and that he did not apply for a license because his attorney [26] advised him it was not necessary since he was not operating the still and did not intend to operate it.

That the collector of internal revenue for the First District of California claims a distilled spirits tax lien upon said pieces of metal or dismantled still in an amount which exceeds the value of said

still; that the lien of said collector of internal revenue attached before the bankrupt's license from the State Board of Equalization expired.

Attorney for Stout, et al, brought out that in addition to having suggested the question as to whether a license was required could be tested by having a felony complaint warrant issued against the trustee, he had suggested other methods, such as a forfeiture proceeding.

That Trustee Green is a man of good reputation was testified to by the president of the Fresno County Bar Association and that he is the chief deputy district attorney of Fresno County.

Further Discussion and Opinion of Referee

The evidence showed, and the Referee found, that the Trustee, now a chief deputy district attorney of Fresno County, California, was a person of good character and yet the State Board of Equalization has never acted upon his application for a license. If his license is granted then the whole question would be settled. The prayer of Stout's petition for leave to commence forfeiture proceedings should be denied until the State Board of Equalization acts upon the trustee's application for a license.

Should the State Board of Equalization deny the application of Trustee Green for a permit or license to possess the still, then and in that event all the interested and necessary parties, and particularly the Collector of Internal [27] Revenue, whose lien

is apparently prior in time and prior in right, should be brought before the Court on appropriate pleadings and process and the rights of all parties, including the United States of America, should be adjudicated.

This case appears very similar to the case of *Pearson vs. Higgins*, decided by the Ninth Circuit and reported in 34 Fed. 2d. at page 27, where the respondents, without waiting for a trial on the merits before the Referee attempted to review the Referee's determination that the Bankruptcy Court had jurisdiction. Judge Dietrich held that the matter attempted to be reviewed was not an appealable order where there was no trial on the merits, holding that the Appellate Courts do not sit to anticipate possible grievances or try out controversies piece-meal. Judge Dietrich said:

“That issue—the only substantive one in the case—neither the referee nor the court below has determined. The referee decided only that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. Being discontent with this ruling, made upon a preliminary objection, appellants, without awaiting the event of a trial on the merits, petitioned the district judge for a review, and the order from which this appeal is prosecuted went no further than to deny the petition. Manifestly, therefore, the appeal is premature. In an ordinary case at law or in equity, an order overruling an objection to the

court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. Appellants could have no real grievance unless and until the referee entered a turnover order. After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain. Appellate courts do not sit to anticipate possible grievances or to try out controversies in piece-meal."

The Referee's order of June 12, 1941, after continuing the restraining order in effect, denied the petition of Stout, et al, until decision by the State Board of Equalization upon the Trustee's application for a license, and expressly retained jurisdiction to entertain pending or future petitions in the premises after action by the State Board of Equalization upon [28] the Trustee's application for a license.

14 Collier on Bankruptcy, at page 1487, the following is said:

"All final orders of the referee are, of course, reviewable. But although interlocutory orders are also reviewable, the review of interlocutory orders which relate to mere preliminary steps in a proceeding, and which may be passed upon effectively at the final stage of the proceeding, is not encouraged. Accordingly the district judges are reluctant to consider upon prelimi-

nary review such matters as an interlocutory order directing the bankrupt to file an answer after he has answered evasively, an interlocutory order refusing to grant a continuance, or an interlocutory order overruling objections to a petition before the referee.”

14 Collier on Bankruptcy, at page 1488, the following is said:

“According to 39c, such a petition must ‘set forth the order complained of and the alleged errors in respect thereto’; and the judge may either decline to pass upon points not specifically designated or he may simply dismiss the petition. The Act does not contemplate a general review of the bankruptcy proceedings, or of rulings not directly affecting an order. Thus, where the complaint is that a particular finding is not supported by the evidence, the assignment of error should state HOW the evidence fails to support the referee’s finding.”

It is respectfully submitted that under the statutes and the authorities, the Bankruptcy Court not only has jurisdiction but a duty to protect the assets in its custody from being taken away by physical force or proceedings in other courts until the State Board of Equalization has acted upon the Trustee’s application for a license and until the Collector of Internal Revenue has a representative of the United States Government which apparently

has a first and prior lien upon the dismantled still brought before the Court by appropriate process and given the right to establish the priority, if any, of its lien.

It is further respectfully submitted that a Bankruptcy Court should not permit assets to be taken out of its custody [29] until the Collector of Internal Revenue has had his day in Court and an opportunity to prove that the government's lien is a first lien upon the dismantled still in question.

The order appealed from is not a final order.

Pearson vs. Higgins, 34 Federal 2d., 27.

Papers Handed Up Herewith

I hand up herewith the following papers:

1. Respondents' Petition for Review of Order of Referee, and exhibits attached thereto.

Dated: July 21, 1941.

Respectfully submitted,

SAMUEL F. HOLLINS

Referee in Bankruptcy

[Endorsed]: Filed Jul. 24, 1941. [30]

(Clerk's Note: The following exhibit is a part of the former Petition for Review certified by the Referee in his former Certificate on Review filed herein Nov. 29, 1940.)

EXHIBIT B

[Title of District Court and Cause.]

MOTION TO DISMISS

George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of the State of California for District D thereof, of the State Board of Equalization of the State of California, in response to the Order to Show Cause issued out of the above entitled Court in the above entitled matter and directed to them and each of them, hereby move to dismiss the petition of Bert M. Green, Trustee in Bankruptcy in the above entitled matter, and the Order to Show Cause issued April 18, 1940, by the Honorable Samuel F. Hollins, Referee in Bankruptcy of said Court, upon the following grounds:

I.

That said petition does not, nor does any part thereof state a cause for relief against the movants herein, or either of them.

EARL WARREN,

Attorney General of the State
of California,

By J. ALBERT HUTCHINSON,

Deputy Attorney General,
Attorneys for George M. Stout
and Luther M. Say.

(Filed with Referee May 11, 1940.)

[Endorsed]: Filed Nov. 29, 1940. R. S. Zimmerman, Clerk. [31]

(Clerk's Note: The following exhibit is a part of the former Petition for Review certified by the Referee in his former Certificate on Review filed herein Nov. 29, 1940.)

EXHIBIT C

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed, by and between George M. Stout, California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, of District "D" of the California State Board of Equalization, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and Bert M. Green, as Trustee in Bankruptcy for George Hugo Malter, Bankrupt, by Frank C. Lerrigo, his attorney, that the following related facts are true and correct and shall be considered as evidence in the hearing of the petition of Bert M. Green, Trustee in Bankruptcy, for George Hugo Malter, Bankrupt, for a Restraining Order restraining George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, from seizing a certain still in possession of Bert M. Green, as said Trustee in Bankruptcy for George Hugo Malter, said facts being as follows, to wit:

That on or about August 12th, 1939, George Hugo Malter was the owner and possessor of a certain

still for the distillation of spirituous liquors; that at said time said George Hugo Malter was the owner and holder of a license [32] from the State of California under the provisions of the alcoholic beverage control act, Statutes of 1935, Chapter 330, as amended, permitting him to own, possess and operate said still; that said license and its privilege had expired at the time of the threatened seizure referred *to the* petition herein.

That on the 12th day of August, 1939, said George Hugo Malter filed a debtor's petition in the above entitled court under the provisions of Section 322 of the Bankruptcy Act of the United States; that thereafter on November 18th, 1939, said George Hugo Malter was adjudicated a bankrupt by the United States District Court, Southern District of California; that on or about November 22nd, 1939, Bert M. Green was duly appointed Trustee in Bankruptcy of the estate of George Hugo Malter, Bankrupt, and thereafter qualified as such Trustee and ever since such time has been and is now the duly appointed, qualified and acting trustee in bankruptcy for the Estate of George Hugo Malter, Bankrupt;

That as such Trustee, said Bert M. Green has come into the possession of said still, owned by the said bankrupt at the time of the filing of his petition in bankruptcy; that said still is dismantled and has not been operated by said Trustee, nor does said trustee contemplate the operation of said still; that said Trustee has not applied for or received a

license from the State of California permitting him to possess or operate said still under the provisions of the California Alcohol Beverage Control Act, Statutes of 1935, Chapter 330, as amended; that the said Trustee owns and possesses said still only in his capacity as Trustee in Bankruptcy of the Estate of George Hugo Malter, Bankrupt;

That by reason of the refusal of Bert M. Green, as such Trustee to apply for and receive the said license from the State of California under the provisions of the said Alcohol Beverage Control Act, George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer for District "D" of the State of California Board of Equalization [33] have threatened and are now threatening to seize said still under the forfeiture provisions of the said Alcohol Beverage Control Act of the State of California, and to remove the said still from the possession and control of Bert M. Green, as said trustee in bankruptcy, and the bankruptcy court of the United States.

Dated at Fresno, California, this 11th day of May, 1940.

EARL WARREN,

Attorney General of the State
of California

By J. ALBERT HUTCHINSON,
Deputy

Attorney for George M. Stout, California
State Liquor Administrator, and Luther
M. Say, Chief Liquor Control Officer, of

District "D" of the California State
Board of Equalization.

FRANK C. LERRIGO,

Attorney for Bert M. Green,
Trustee in Bankruptcy.

(Filed with Referee May 11, 1940)

[Endorsed]: Filed Nov. 29, 1940. R. S. Zimmerman,
Clerk. [34]

(Clerk's Note: The following exhibit is a part
of the former Petition for Review certified by the
Referee in his former Certificate on Review filed
herein Nov. 29, 1940.)

EXHIBIT D

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS AND ORDER CONTINUING RESTRAIN- ING ORDER

The Trustee having filed herein on April 18, 1940,
his petition for Restraining Order; and on said
date an Order to Show Cause and Restraining Or-
der was issued directed to George M. Stout, Cali-
fornia State Liquor Administrator and Luther M.
Say, as Chief Liquor Control Officer of California
State Board of Equalization, restraining said offi-
cers from seizing a certain still for the distillation
of spirituous liquors, which still was under the
jurisdiction and control of the Trustee, and the
said officers having appeared herein on May 11, 1940

by Earl Warren, Attorney General of the State of California and J. Albert Hutchinson, Deputy Attorney General and moved the Court to dismiss the petition of the Trustee and the Order to Show Cause on the grounds “that said petition does not nor does any part thereof state the cause for relief as against the movements or either of them”; and the matter having been argued in open court and having been submitted on briefs and the Court having considered the same and being fully advised in the premises and being satisfied that the Court has jurisdiction of the subject matter and the still in question, and that the matter should be presented [35] on the merits after giving notice to all interested parties including the United States of America who claims a lien on the still for distilled spirits taxes,

It is therefore ordered, adjudged and decreed that the Motion to Dismiss be and the same is hereby denied.

It is further ordered, adjudged and decreed that the Restraining Order heretofore entered in the above entitled matter be and the same is hereby continued in full force and effect until the matter is presented on the merits and until further order of the Court.

Dated: October 26, 1940.

SAMUEL F. HOLLINS

Referee in Bankruptcy

[Endorsed]: Filed Nov. 29, 1940. R. S. Zimmerman, Clerk. [36]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER
OF REFEREE

To the Honorable, the District Court of the United
States:

Your petitioners, George M. Stout, as State
Liquor Administrator of the State of California,
and Luther M. Say, as Chief Liquor Control Officer
of District D of the State Board of Equalization,
respectfully represent:

I.

That Richard E. Collins, George R. Reilly, Fred
E. Stewart, William G. Bonelli are the duly elected,
qualified and acting members of the State Board of
Equalization of the State of California, and that
Honorable Harry B. Riley, State Controller, is
ex officio member of said Board; that your peti-
tioner George M. Stout is the duly appointed,
qualified [37] and acting State Liquor Administra-
tor of the State of California, and that your peti-
tioner Luther M. Say is the Chief Liquor Control
Officer of District D of said State Board of Equal-
ization.

II.

That the said State Board of Equalization is
given the duty of enforcing the Alcoholic Beverage
Control Act of the State of California (Statutes
1935, p. 1123, as amended) and the provisions of
the Constitution of the State of California relating

to the alcoholic beverage industry and its incidents (Article XX, section 22), and your petitioners herein are the employees and officers of said Board whose duty it is to enforce the requirements of licensing, to make and carry out seizures, and investigate and inform upon violations of the penal provisions of said Act in the State of California and the portion thereof embraced within the territorial jurisdiction of this Court.

III.

That heretofore and on or about the 18th day of April, 1940, Bert M. Green, trustee in bankruptcy of George Hugo Malter, the bankrupt above named, procured upon a petition for restraining order and order to show cause signed and verified by him in said proceedings, a restraining order and order to show cause directed to your petitioners and returnable before the Honorable Samuel F. Hollins, on the 11th day of May, 1940; that a copy of said order is attached hereto as Exhibit A, and is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length.

[38]

IV.

That said Bert M. Green alleged in said petition:

That the bankrupt above named filed a debtor's petition pursuant to section 322 of the Bankruptcy Act on the 12th day of August, 1939, in the above-entitled Court; that thereafter and on or about the 18th day of November, 1939, said bankrupt was

duly adjudicated a bankrupt; that he was the trustee of the estate of the above-named bankrupt, appointed by said referee as such trustee on the 22nd day of November, 1939; that he had taken possession of the assets of said bankrupt, which included equipment designed for the manufacture of brandy from grapes; that a part of said equipment was "a dismantled still designed for the distillation of brandy"; that the still had not been operated in any manner since it came into the possession of said trustee; that there was no money in said estate, and the properties of the estate were subject to the liens created through judicial proceedings in the State courts, which liens were in existence for more than four (4) months at the date of the filing of the debtor and bankruptcy proceedings; that said claims aggregate approximately \$9,201.96, and include a claim filed by the Collector of Internal Revenue of the United States in the amount of \$710.73, which claim purports to constitute a statutory lien against the assets of the bankrupt for amounts due as unpaid alcoholic beverage taxes due the Collector of Internal Revenue of the United States; that your petitioners, although they had filed no claim in the proceedings, had demanded that said trustee apply for and obtain a license from the State of California as required by the Alcoholic Beverage Control Act of said state in order to possess and continue to possess said [39] alcoholic beverage still, and to pay therefor the sum of \$10.00, specified

as the fee for such still license; that your petitioners, in default of such license and the payment of such license fee, also threatened to commence criminal proceedings against said trustee for failure to comply with said Act with respect to possessing said still, and likewise threatened to seize said still and to commence forfeiture proceedings against the same, as permitted by said Act; that said still is a valuable asset of said estate; and that the threatened action of your petitioners would cause irreparable injury to the estate and hamper the trustee in the orderly administration of the estate of said bankrupt.

V.

That thereafter and on or about the 11th day of May, 1940, to which date the return on the said order to show cause had been duly continued, your petitioners appeared in response to said order to show cause and filed in said proceedings pending before said referee of this Court their certain motion to dismiss and notice of motion to dismiss; that said motion to dismiss was heard on said last-mentioned day and submitted to said referee upon memorandum to be filed in said proceedings.

VI.

That at said hearing said trustee and your petitioners submitted to said referee as a part of the record in said proceedings their certain written stipulation dated the 11th day of May, 1940; that said stipulation was indetical in form and substance

with that certain stipulation dated the 24th day of May, 1940, hereinafter more particularly referred to, and which is filed herein and attached hereto as Exhibit B [40] and made a part hereof for all purposes with the same force and effect as though herein set forth at length, save and except the statement in the latter stipulation, in the second paragraph thereof, that said bankrupt did not hold nor possess a license permitting him to own or possess the still in question on or after the 1st day of July, 1939, and the statement in the fourth paragraph thereof that said trustee had applied to the appropriate officers of the State of California on or about the 11th day of December, 1940, for a license permitting him to possess said still, which latter statements were not included in said stipulation dated the 11th day of May, 1940.

VII.

That thereafter and on or about the 20th day of October, 1940, said memoranda were filed by the parties to said proceeding on said order to show cause, and the matter was submitted to said referee.

VIII.

That thereafter and on or about the 26th day of October, 1940, said referee determined said motion to dismiss by denying the same, saving and allowing to your petitioners herein an exception; and that said order was in writing.

IX.

That said motion to dismiss was denied upon the grounds stated in said memoranda and order, which are that the bankruptcy court had exclusive jurisdiction of the res, namely, said brandy still, and the United States of America possessed therein and thereon a statutory lien for the amount of \$710.73 as unpaid distilled spirits taxes, for which reasons the officers of the State were without jurisdiction to act in [41] any manner with respect to said still.

X.

That in said order said referee ordered and directed that the restraining order theretofore made, as aforesaid, be continued in force until further order of the Court, reserving to your petitioners the right to file in bankruptcy such petition or other process which they deemed advisable.

XI.

That thereafter your petitioners petitioned this Honorable Court for a review of said order of said referee, which petition was allowed and heard upon the certificate of said referee; that said certificate did not contain, however, and said referee did not certify to this Honorable Court, said stipulation dated May 11, 1940, nor certify the existence of the facts therein set forth, thus preventing the consideration by this Honorable Court of the matters therein contained and the facts therein established: that thereafter said petition was dismissed by this

Honorable Court on December 7, 1940, as being premature for the reason that said stipulation was not certified to this Honorable Court, and for the reason that the Court concluded that the matter was heard upon a motion to dismiss only; and that the proceeding was remanded to said referee for further proceedings.

XII.

That thereafter, and on or about the 12th day of December, 1940, your petitioners duly filed with said referee and served on said trustee, their certain "Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout and Luther M. Say for Release and Delivery of Possession of a Certain Distilled Spirits Still," [42] a copy of which is attached hereto as Exhibit C, and made a part hereof for all purposes with the same force and effect as though herein set forth at length.

XIII.

That in said Answer and Petition petitioners admitted the allegations of said petition respecting their employment and office, the requirements of the Alcoholic Beverage Control Act of the State of California therein referred to, and that petitioners had demanded that said trustee apply for an appropriate license for the continued possession of said still, and denied all of the other allegations contained in said petition.

XIV.

That in said Answer and Petition petitioners alleged that the trustee had not applied for and did not possess a still license or permit from any officer of the State of California permitting him to possess the same, and that by reason of the operation of the provisions of the Alcoholic Beverage Control Act of the State of California and the failure to license said still, the same became and was forfeited to the State of California as provided by the Alcoholic Beverage Control Act of the State of California; and alleged that it was the duty of petitioners to seize and take possession of stills and other property forfeited to the State of California by virtue of said Act, to hold the same for the purposes of such forfeitures, and to cause the commencement and prosecution of appropriate actions in the appropriate courts of the State of California for the confirmation of such forfeitures.

XV.

That petitioners in said Answer and Petition prayed [43] that by appropriate order of this court said still be delivered to them for the purposes of said Act, and that they be granted leave to proceed pursuant to the provisions of the statutes of said state with respect to the seizure and forfeiture of said still.

XVI.

That thereafter said trustee answered the allegations of said Answer and Petition of petitioners by

an answer in writing dated May 6, 1941, a copy of which is attached hereto as Exhibit D and made a part hereof for all purposes with the same force and effect as though herein set forth at length.

XVII.

That thereafter the above-entitled proceeding came on for further hearing before said referee on the 24th day of May, 1941, upon the pleadings and documents hereinbefore described; that at said hearing testimony was offered and received on behalf of said trustee to the effect that the trustee was of good character, had refused to procure the still license required by said Act upon the advice of his attorney and the direction of the referee, and because he had no moneys in his possession with which to pay the fee required for such still license; that he had acted as the trustee in another proceeding in this court involving a similar still, and that he had not filed an application therein to procure still licenses upon the advice of counsel and the direction of said referee, although in that proceeding he did have funds with which to pay the fee required for such still license; that at said hearing said trustee and petitioners introduced into evidence by stipulation certain correspondence between counsel for [44] said trustee and counsel for said petitioners, and letters as follows:

Communication dated January 22, 1940, addressed by Earl Warren, Attorney General (by J. Albert Hutchinson, Deputy) to Frank C. Lerrigo, Esq.;

Communication dated April 18, 1940, addressed by Frank C. Lerrigo, Esq. to Mr. Earl Warren, Attorney General;

Communication dated October 2, 1940, addressed by Frank C. Lerrigo, Esq. to J. Albert Hutchinson, Deputy Attorney General;

Communication dated October 10, 1940, addressed by Frank C. Lerrigo, Esq. to Mr. J. Albert Hutchinson, Deputy Attorney General;

that copies of said communications are attached hereto as Exhibit E and made a part hereof for all purposes with the same force and effect as though herein set forth at length; that said communications establish that said trustee was the trustee of Kearney Winery Company, Inc., as well as trustee herein, and possessed certain distilled spirits stills formerly belonging to that bankrupt corporation, which bankruptcy proceeding was pending in this court; that petitioners demanded, on behalf of the State of California, that appropriate licenses be procured by said trustee; that following said demand a conference was held by representatives of petitioners and other officers of the State of California and a representative of said trustee, at which time said representatives reached an understanding that said trustee would immediately procure licenses for said stills in said estates; that thereafter, in violation of said understanding, said trustee and said referee refused to apply and to permit the

application for said licenses; that thereupon [45] said trustee required the procurement of the temporary restraining order herein from said referee; that said trustee persistently refused to apply for a license until after the denial of petitioner's petition for review on December 7, 1940, by this Court, as aforesaid;

That at said hearing petitioners and said trustee executed through their respective counsel and submitted as evidence in this proceeding said stipulation dated May 24, 1940, a copy of which is attached hereto as Exhibit B, as aforesaid; that it is established by said stipulation that at all times subsequent to July 1, 1939, said still was possessed by said bankrupt, and subsequent to August 12, 1939, by said Bankrupt as a debtor in possession, and subsequent to November 22, 1939, by said trustee without any license, permit or consent to the possession of the same by said parties or either of them as owner or officer of this court, or otherwise; and that said trustee refused to apply for a license to possess said still until on or about December 11, 1940.

XVIII.

That thereafter and on or about June 12, 1941, said referee made and entered his certain "Order on Petition for Restraining Order and Order to Show Cause, Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout, et al. for Release

and Delivery of Possession of a Certain Distilled Spirits Still," a copy of which is attached hereto as Exhibit F and made a part hereof for all purposes with the same force and effect as though herein set forth at length; that in said order said referee found in part as follows: [46]

" * * * that on August 12, 1939, the above named bankrupt filed a debtor's petition under the provisions of Section 322 of the Bankruptcy Act; that thereafter and on November 18, 1939, Malter was adjudicated a bankrupt and on November 22, 1939, Green was appointed trustee and he thereafter qualified as such trustee and has continued to act as such trustee and as such came into the possession of said dismantled still; that said trustee has neither operated or has he contemplated the operation of said still;

That on or about the 22nd day of January, 1940, Deputy Attorney General J. Albert Hutchinson requested of the trustee's counsel that the trustee apply for a license with the State Board of Equalization; that at said time and for a long time thereafter the trustee was absolutely without any funds whatsoever;

That all of the allegations of the trustee's petition for restraining order filed herein on April 18, 1940, are true; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California;

That thereafter, said trustee having converted some of the assets into money, on or about the 11th day of December, 1940, made written application on forms provided by the State Board of Equalization of the State of California for a license on said still and accompanied said application with a certified check in the proper amount; that said trustee is a person of good reputation; that although said State Board of Equalization has had said application and said certified check for more than five months they have neither granted or denied said application. * * *''

That said referee did in said order grant the prayer of said trustee's petition and continue the said temporary restraining order in full force and effect until action is taken by the State Board of Equalization upon the application of said trustee for a license, and deny the petition of petitioners for leave to commence forfeiture proceedings and all other relief prayed for by petitioners in said proceeding until action is taken by the State Board of Equalization upon the application of said trustee for a license and until further order of the referee, and retained jurisdiction of the proceeding to entertain pending or further petitions in the premises [47] after action by said State Board of Equalization upon the said trustee's application for a license.

XIX.

That said restraining order dated April 18, 1940, and above described, and said order dated October 26, 1940, and said order dated June 12, 1941, continuing said restraining order in effect, and the latter granting the prayer of said trustee and denying to petitioners any relief upon their petition for leave to commence forfeiture proceedings to determine the existence of the forfeiture of said still, and above described, are, and each of them is, erroneous, in that:

(1) This Court, by and through said Honorable Samuel F. Hollins, referee thereof, or otherwise, lacks jurisdiction of the subject-matter of the cause of action set forth and alleged in said purported petition of said trustee;

(2) Said referee and this Court lack jurisdiction of the persons of petitioners in their said respective official capacities;

(3) Said orders are and each of them is against law in that:

(a) It is not a proper proceeding for injunctive relief of the nature granted by said orders;

(b) An adequate remedy at law exists on the purported claims and causes of action set forth in said petition;

(c) There is an insufficiency of evidence to support the findings of said referee and to support said orders; [48]

(4) Said orders deny to petitioners, as officers of the State of California, leave to commence appropriate actions in the courts of said state for the purpose of determining and enforcing a forfeiture occurring by (a) the unlawful possession by said bankrupt prior to the attaching of jurisdiction of the court herein, and (b) the unlawful possession by said trustee as trustee herein;

(5) Said orders restrain petitioners, as officers of the State of California, from the enforcement of a public statute of that state enacted for the public benefit;

(6) Said orders restrain petitioners, as such officers, from the enforcement of penal laws respecting the unlawful possession of an unlicensed still;

(7) Said orders authorize and direct said trustee to violate the penal provisions of said Act and the provisions thereof imposing a tax for the privilege of possessing a distilled spirits still.

Wherefore, your petitioners pray:

(1) That this proceeding be certified to the District Court of the United States, Southern District of California, Northern Division, for a review by that court;

(2) That said orders be reviewed and reversed by said court;

(3) That said petition of said trustee for restraining order or injunction be dismissed; [49]

(4) That said temporary restraining order and said orders continuing the same in effect be vacated, set aside and held for naught;

(5) That the prayer of petitioners in said "Answer and Petition for Restraining Order" and for leave to commence and prosecute proceedings in the courts of the State of California with respect to the forfeiture of said still be granted;

(6) That petitioners be awarded their costs of suit herein incurred and incurred upon said review; and

(7) That the following be certified to the court for review by the referee herein:

(a) Petition for Restraining Order and Order to Show Cause.

(b) Restraining Order and Order to Show Cause, dated May 11, 1940.

(c) Motion to Dismiss.

(d) Notice of Motion to Dismiss.

(e) Stipulation dated May 11, 1940.

(f) Order Denying Motion to Dismiss and Order Continuing Restraining Order, dated May 26, 1940.

(g) Answer and Petition of George M. Stout and Luther M. Say.

(h) Answer of Bert M. Green, Trustee, to Petition of George M. Stout and Luther M. Say.

(i) Stipulation of May 24, 1941. (Note: This stipulation was filed on or about June 10,

1941, and may have been erroneously dated [50] by counsel for trustee as of date June 7, 1941;

(j) Order on Petition dated June 12, 1941.

(k) Testimony and documentary evidence offered and rejected, and testimony and documentary evidence offered and received by the referee at the hearing of said proceeding on May 24, 1941, and motions, objections, rulings thereon, and rulings on evidence.

Respectfully submitted,

EARL WARREN

Attorney General of the State
of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M. Stout
and Luther M. Say [51]

State of California,
City and County of San Francisco—ss.

J. Albert Hutchinson, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioners named in the foregoing petition; that as such he is acquainted with the matters therein set forth, and that except as to those matters which are therein stated on information or belief, the statements therein are true of his own knowledge, and as to the latter he believes the same to be true; that said petitioners and each of them reside outside of

the City and County of San Francisco, State of California, the place where affiant maintains his office; and that affiant is authorized to and does hereby make this verification by and upon behalf of said petitioners.

J. ALBERT HUTCHINSON

Subscribed and sworn to before me this 19th day of June, 1941.

(No Seal)

CHAS. W. JOHNSON

Deputy Attorney General of
the State of California

[Endorsed]: Filed Jun. 21, 1941. Samuel F. Hollins, Referee. Filed Jul. 24, 1941. R. S. Zimmerman, Clerk. [52]

EXHIBIT A

[Title of District Court and Cause.]

RESTRAINING ORDER AND ORDER
TO SHOW CAUSE.

At Fresno, in said District, on the 18th day of April, 1940.

Upon reading the verified petition of Bert M. Green, Trustee in Bankruptcy of George Hugo Malter, the above named bankrupt, duly filed herein; upon all the other papers filed and proceedings had herein; and upon motion of Frank C. Lerrigo, attorney for said trustee, and good cause appearing therefor,

It Is Ordered that George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the California State Board of Equalization, and each and every person acting for and in aid and assistance of the said George M. Stout as California State Liquor Administrator, and Luther M. Say as Chief Liquor Control Officer of District D of the State of California, and their agents and employees, be, and each of them is hereby restrained until the hearing of this order, and until the further order of this Court from seizing that certain still for the distillation of spirituous liquors, now located on the premises, belonging to the estate of George Hugo Malter, a bankrupt, the said premises [53] being described as follows: Real property in the County of Fresno, State of California, described as follows:

The East half of Lot 31 of Easterby Rancho, according to the map thereof recorded June 24, 1880 in Pat Book 2 at page 6, in the office of the County Recorder of said County,

and which premises and the said still located thereon are now under the jurisdiction and control of Bert M. Green, as Trustee in Bankruptcy, for George Hugo Malter, bankrupt, and the said George M. Stout and Luther M. Say, their agents and employees are further restrained from interfering in any way with the possession and control of said still by Bert M. Green, as such Trustee in Bankruptcy, and

from interfering in any way with the orderly administration of the estate of said bankrupt until the further order of this Court.

It Is Further Ordered, that George M. Stout as such State Liquor Administrator, and the said Luther M. Say, as Chief Liquor Control Officer of District D of the State of California, shall appear before this Court at the courtroom located in the Pacific Southwest Building, at Room 710 thereof, on the 11th day of May, 1940, at nine-thirty o'clock A. M., of said day, then and there to show cause if any they have, why the said restraining order shall not continue in full force and effect, and why such other and further order should not be made as may be proper in the premises.

Dated at Fresno, California, this 18 day of April, 1940.

SAMUEL F. HOLLINS

Referee in Bankruptcy of
said Court. [54]

EXHIBIT B

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed, by and between George M. Stout, California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, of District "D" of the California

State Board of Equalization, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and Bert M. Green, as Trustee in Bankruptcy for George Hugo Malter, Bankrupt, by Frank C. Lerigo, his attorney, that the following related facts are true and correct and shall be considered as evidence in the hearing of the petition of Bert M. Green, Trustee in Bankruptcy, for George Hugo Malter, Bankrupt, for a Restraining Order restraining George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, from seizing a certain still in possession of Bert M. Green, as said Trustee in Bankruptcy for George Hugo Malter, said facts being as follows, to-wit:

That on or about August 12th, 1939, George Hugo Malter was the owner and possessor of a certain still for the distillation of spirituous liquors; that at said time said George Hugo Malter was not the owner and holder of a license from the State of California under the *provisions* of the alcoholic beverage control act, Statutes of 1935, Chapter 330, [55] as amended, permitting him to own, possess and operate said still, his said license having expired on June 30th, 1939, and at the time of the threatened seizure referred to in the petition herein.

That on the 12th day of August, 1939, said George Hugo Malter filed a debtor's petition in the above entitled court under the provisions of Section 322 of the Bankruptcy Act of the United States; that there-

after on November 18th, 1939, said George Hugo Malter was adjudicated a bankrupt by the United States District Court, Southern District of California; that on or about November 22nd, 1939, Bert M. Green was duly appointed Trustee in Bankruptcy of the estate of George Hugo Malter, Bankrupt, and thereafter qualified as such Trustee and ever since such time has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy for the Estate of George Hugo Malter, Bankrupt;

That as such Trustee, said Bert M. Green has come into the possession of said still, owned by the said bankrupt at the time of the filing of his petition in bankruptcy; that said still is dismantled and has not been operated by said Trustee, nor does said Trustee contemplate the operation of said still; that Bert M. Green, as such Trustee refused to apply for a license to possess or operate said still until on or about December 11th, 1940, at which time he did apply for said still license, and said application has not been granted or denied by the State Board of Equalization of the State of California; that the said Trustee owns and possesses said still only in his capacity as Trustee in Bankruptcy of the Estate of George Hugo Malter, Bankrupt;

That by reason of the refusal of Bert M. Green, as such Trustee to apply for and receive the said license from the State of California under the pro-

visions of the said Alcohol [56] Beverage Control Act, George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer for District "D" of the State of California Board of Equalization have threatened and are now threatening to seize said still under the forfeiture provisions of the said Alcohol Beverage Control Act of the State of California, and to remove the said still from the possession and control of Bert M. Green, as said Trustee in Bankruptcy, and the Bankruptcy Court of the United States.

Dated at Fresno, California, this 24th day of May, 1941.

EARL WARREN,

Attorney General

By J. ALBERT HUTCHINSON

Attorney for George M. Stout,
California State Liquor Administrator, and Luther M. Say, Chief Liquor Control Officer, of District "D" of the California State Board of Equalization.

FRANK C. LERRIGO

Attorney for Bert M. Green,
Trustee in Bankruptcy. [57]

EXHIBIT C

[Title of District Court and Cause.]

ANSWER OF GEORGE M. STOUT AND
LUTHER M. SAY TO PETITION FOR RE-
STRAINING ORDER, AND PETITION OF
GEORGE M. STOUT AND LUTHER M.
SAY FOR RELEASE AND DELIVERY OF
POSSESSION OF A CERTAIN DISTILLED
SPIRITS STILL.

Now Come George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization of said state, and answer the petition of Bert M. Green, trustee in the above-entitled action, dated April 18, 1940 for restraining order, and for answer thereto admit, deny and aver as follows: [58]

I.

Answering respondents have no knowledge or information sufficient to enable them to form a belief concerning the truth or falsity of the matters set forth and alleged in said petition on pages 1 and 2 thereof, to and including line 18 of said last-numbered page, and that portion of said petition appearing on page 3 commencing with line 10 through line 19 on said last-numbered page, and placing their answer upon the ground that they have no knowledge, information or belief, deny conjunctively and disjunctively, generally and specifically, each and

every, all and singular, the allegations contained in said portions of said petition, and each of said allegations.

II.

Answering respondents admit the allegations contained in said petition commencing with line 19 on page 2 through line 10 on page 3, save and except that statement contained on page 2 thereof commencing on line 28, and reading as follows:

“That your petitioner has no funds belonging to said estate and has not operated said still and does not intend to operate said still and said still cannot be operated without expenditure of substantial funds in rebuilding said still.”——

concerning the truth or falsity of which quoted statement answering respondents have no knowledge or information sufficient to form a belief, and placing their answer upon that ground, answering respondents deny conjunctively and disjunctively, generally and specifically, each and every, all and singular, the allegations and statements contained in said quoted statement of said petition.

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Further answering said petition, and as and for a separate answer thereto, and as and for a petition and claim on behalf of the People of the State of California, answering respondents admit, deny and aver as follows:

I.

That the still described in said petition of Bert M. Green and dated April 18, 1940, reference to which is hereby made, and which is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length, at all times therein and herein mentioned has been and now is an alcoholic beverage still; that since the 18th day of November, 1939 said still has not been licensed to any person by the State Board of Equalization of the State of California; that said Bert M. Green has not applied for nor received, and does not hold, any license or permit of the said State Board of Equalization or of any other officer of the State of California permitting him to possess said still; that said still has been at all of said times located within the State of California and is now within said state.

II.

That by reason of the facts alleged in said petition and herein, said still has been forfeited to the State of California by virtue of and pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes 1935, Chapter 330, as amended); that it is the duty of answering respondents to seize and take possession of stills and other property forfeited to the State of California by virtue of said Act, and to hold the same for the purpose of such forfeitures, and spe-

cifically that it is the duty of answering respondents to seize and take possession of said [60] still pursuant to said Act, and to thereafter cause the commencement of an action in the appropriate courts of the State of California for the confirmation of said forfeiture by the appropriate officers of the State of California.

Wherefore, answering respondents pray that the restraining order and injunction herein sought by said Bert M. Green, trustee in the above-entitled proceeding, be denied; that the temporary restraining order of the referee made and executed herein on the 18th day of April, 1940, restraining answering respondents from seizing said still and interfering with the possession and control of said still by said Bert M. Green until further order of said court, and that certain order dated October 26, 1940, by said referee, continuing said restraining order of April 18, 1940 in full force and effect until further order of the court, be recalled, annulled and set aside; that Bert M. Green, trustee take nothing by reason of his said petition, or otherwise; that answering respondents herein be given possession of said still as required by law, for the purposes of said statutes of the State of California; and that the court make and enter its order releasing to answering respondents said still, and directing said trustee to deliver possession of the same to them for the purposes of said statutes, as aforesaid, with leave to answering respondents and other appropriate offi-

cers of the State of California to proceed pursuant to the provisions of the statutes of said state.

EARL WARREN

Attorney General of the State
of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M. Stout
and Luther M. Say [61]

State of California,
City and County of San Francisco—ss.

J. Albert Hutchinson, being first duly sworn, deposes and says:

That he is one of the attorneys for the answering respondents and petitioners in the foregoing Answer and Petition; that as such he is acquainted with the matters therein set forth, and that except as to those matters which are therein stated on information or belief, the statements therein are true of his own knowledge, and as to the latter he believes the same to be true; that said answering respondents and petitioners and each of them reside outside of the City and County of San Francisco, State of California, the place where affiant maintains his office; and that affiant is authorized to and does hereby make this verification by and upon behalf of said answering respondents and petitioners.

J. ALBERT HUTCHINSON

Subscribed and sworn to before me this 12th day of December, 1940.

(No Seal)

JAMES E. SABINE

Deputy Attorney General of
the State of California [62]

EXHIBIT D

[Title of District Court and Cause.]

ANSWER OF BERT M. GREEN, TRUSTEE IN
BANKRUPTCY FOR GEORGE HUGO
MALTER TO PETITION OF GEORGE M.
STOUT AND LUTHER M. SAY FOR RE-
LEASE AND DELIVERY OF POSSESSION
OF DISTILLED SPIRITS STILL.

Now comes Bert M. Green, Trustee of the above named bankrupt and answers the petition of George M. Stout and Luther M. Say for release and delivery of possession of a certain distilled spirits still and for an answer thereto, admits, denies and alleges as follows, to-wit:

I.

Bert M. Green, as said Trustee denies generally and specifically, conjunctively and disjunctively each and every, all and singular the allegations contained in said petition, not in Trustee's petition for restraining order and injunction, and in that

certain stipulation by the parties hereto, dated May 11th, 1940, expressly admitted to be true.

As and for a Separate, Distinct and Affirmative Defense to the Said Claim and Petition of Luther M. Say and George M. Stout, Bert M. Green, as Trustee in Bankruptcy, Alleges as Follows, to-wit:

[63]

I.

That the said Bert M. Green, as said trustee failed and refused to procure a still license as of May the 11th, 1940, the date of the above referred to stipulation under an honest mistake of law, and since that time has duly applied for a still license from the State of California authorizing him to possess the said still, and has tendered the legal fee required for the said still license; that the said Bert M. Green is a fit and proper person to receive a still license and the premises upon which said still is located are proper premises for the location of a still; that the State Board of Equalization has not acted on the application of the said Bert M. Green, said trustee, for a still license; that the said Bert M. Green has complied with all the laws of the State of California, concerning the application for a still license, and by reason of the said application and by reason of the right of said Bert M. Green to have a still license, the said still is legally possessed by the said Bert M. Green.

Wherefore, the said Bert M. Green prays that the injunction and restraining order issued by the

above entitled court, restraining and enjoining George M. Stout and Luther M. Say from doing any act to interfere with the possession of said still license may continue in full force and effect, and that the petition and claim of George M. Stout and Luther M. Say for the possession and seizure and forfeiture of said still be dismissed.

BERT M. GREEN

Petitioner

FRANK C. LERRIGO

Attorney for Petitioner [64]

State of California,
County of Fresno—ss.

Bert M. Green, being first duly sworn deposes and says:

That he is the Trustee in Bankruptcy for George Hugo Malter, bankrupt; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters he believes it to be true.

BERT M. GREEN

Subscribed and sworn to before me this 6th day of May, 1941.

[Seal]

F. C. LERRIGO

Notary Public in and for the County of Fresno,
State of California. [65]

EXHIBIT F

[Title of District Court and Cause.]

ORDER ON PETITION FOR RESTRAINING
ORDER AND ORDER TO SHOW CAUSE,
ANSWER OF GEORGE M. STOUT AND
LUTHER M. SAY TO PETITION FOR RE-
STRAINING ORDER, AND PETITION OF
GEORGE M. STOUT, ET AL. FOR RE-
LEASE AND DELIVERY OF POSSESSION
OF A CERTAIN DISTILLED SPIRITS
STILL.

At Fresno, California, in said District, on the 12th day of June, 1941. Upon the petition of Bert M. Green, Trustee, for restraining order and order to show cause filed herein on April 14, 1940, and the answer of George M. Stout and Luther M. Say, and petition of said Stout, et al, for release and delivery of possession of a still, filed herein on May 7, 1941, upon the bankruptcy petition, the order of adjudication, and upon all other papers and proceedings had herein, and upon due consideration of the testimony of the witnesses and other evidence, and after hearing Frank C. Lerrigo, attorney for the Trustee, and J. Albert Hutchinson, deputy attorney general, in opposition to the trustee's petition and in support of the petition of George M. Stout, et al, for the release and delivery of possession of a still, the Referee hereby finds that on or about August 12, 1939, the above named bankrupt was the owner and possessor of a dismantled still

for the distillation of liquor; that on August 12, 1939, the [66] above named bankrupt filed a debtor's petition under the provisions of Section 322 of the Bankruptcy Act; that thereafter and on November 18, 1939, Malter was adjudicated a bankrupt and on November 22, 1939, Green was appointed trustee and he thereafter qualified as such trustee and has continued to act as such trustee and as such came into the possession of said dismantled still; that said trustee has neither operated or has he contemplated the operation of said still;

That on or about the 22nd day of January, 1940, Deputy Attorney General J. Albert Hutchinson requested of the trustee's counsel that the trustee apply for a license with the State Board of Equalization; that at said time and for a long time thereafter the trustee was absolutely without any funds whatsoever.

That all of the allegations of the trustee's petition for restraining order filed herein on April 18, 1940, are true; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California;

That thereafter, said trustee having converted some of the assets into money, on or about the 11th day of December, 1940, made written application on forms provided by the State Board of Equalization of the State of California for a license on said still and accompanied said application with a certified check in the proper amount; that said trustee

is a person of good reputation; that although said State Board of Equalization has had said application and said certified check for more than five months they have neither granted or denied said application.

Now, upon motion of Frank C. Lerrigo, Esq., attorney for said Trustee, it is

Ordered that the prayer of said trustee's petition be and the same is hereby granted, and said temporary restraining [67] order is hereby continued in force and effect until action is taken by the State Board of Equalization upon the application of the trustee for a license, and the petition of respondents Stout, et al, is hereby denied until action is taken by the State Board of Equalization upon the application of the trustee herein for a license, and until the further order of the Court. Jurisdiction of the Referee is hereby retained to entertain pending or future petitions in the premises, after action by the State Board of Equalization upon the trustee's application for a license herein.

SAMUEL F. HOLLINS

Referee in Bankruptcy [68]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrigo, the attorney of record of the trustee, Bert M. Green for the above-named bankrupt, maintains an office at Pacific Southwest Bldg. in Fresno County of Fresno State of California; and between said two places there is a regular communication by mail; on the 20 day of June, 1941, I served a true copy of the Petition for Review of Order of Referee herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

VERNON C. PALMER

Subscribed and sworn to before me, this 20 day of June, 1941.

CHAS. W. JOHNSON

Deputy Attorney General

[Endorsed]: Filed Jun. 21, 1941. Samuel F. Hollins, Referee. Filed Jul. 24, 1941. R. S. Zimmerman, Clerk. [68-A]

[Title of District Court and Cause.]

Notice is hereby given that the Certificate and Report of Referee on Petition of George M. Stout, as State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization, to Review Order of Referee was filed with the Clerk of the above entitled Court on the 23rd day of July, 1941, and in the ordinary course of events should be on the calendar on 13th day of October, 1941.

Dated: July 23, 1941.

SAMUEL F. HOLLINS

Referee in Bankruptcy

[Endorsed]: Filed Jul. 24, 1941. [69]

[Title of District Court and Cause.]

NOTICE OF TIME AND PLACE OF HEARING
UPON CERTIFICATE FOR REVIEW

To Bert M. Green, Trustee in the above entitled proceeding and to Frank C. Lerrigo, his Attorney:

You and each of you will please take notice that the certificate and report of Referee on petition of George M. Stout, as State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization,

to review order of Referee was filed with the Clerk of the above entitled Court on the 23rd day of July, 1941.

You will please take further notice that said George M. Stout and Luther M. Say will, on Monday, the 13th day of October, 1941, move the above entitled Court for review of said certificate and report of Referee and will at said time move the above entitled Court for its order reversing that certain [70] restraining order and order to show cause of said Referee made on April 18, 1940, and that certain order of said Referee, dated June 12, 1941, and restraining and enjoining said George M. Stout and said Luther M. Say in their said official capacities from enforcing the Alcoholic Beverage Control Act of the State of California with respect to said Trustee, both of which orders are more particularly described and set forth in said certificate and report of said Referee.

You will please take further notice that said hearing and said motions will be made in the Court Room of the above entitled Court, at the Federal Building, Civic Center, Fresno, California, at the hour of ten o'clock A. M., of said October 13, 1941, or as soon thereafter as counsel may be heard, and if not heard on said date to be continued from day to day until the same has been heard and submitted.

Dated: September 5, 1941.

EARL WARREN

Attorney General of the State
of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M. Stout
and Luther M. Say

[Endorsed]: Filed Sep. 9, 1941. [71]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrego the attorney of record of the above-named George Hugo Malter, Bankrupt maintains an office at Rowell Building in Fresno, County of Fresno, State of California; and between said two places there is a regular communication by mail; on the 5th day of September, 1941, I served a true copy of the Notice of Time and Place of Hearing Upon Certificate for Review herein, to the original of which this affidavit is attached, on said last-named

attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

MARIE MYERS

Subscribed and sworn to before me, this 5th day of September, 1941.

J. ALBERT HUTCHINSON

Deputy Attorney General

[Endorsed]: Filed Sep. 9, 1941. [72]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND MEMORAN-
DUM IN BEHALF OF UNITED STATES
OF AMERICA

Comes now the United States of America, by William Fleet Palmer, United States Attorney, and Walter M. Campbell, Assistant United States Attorney, and appears specially for the purpose of objecting to the jurisdiction of this Court to grant the relief sought herein by the petition of George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, to review and set aside the order of the Referee in Bankruptcy herein made and entered on the 12th day of June, 1941, wherein a certain temporary restraining order

theretofore issued by the said Referee against Petitioners was continued in force.

That the grounds of opposition to such petition are as follows:

(1) The United States of America is a necessary party to any determination of title or right to possession of the personal property involved;

(2) The appeal of the State Officers is premature.

I.

The United States Is a Necessary Party

It has been admitted that the United States, acting through the Collector of Internal Revenue, had filed its claim in the bankrupt estate for \$710.73 unpaid distilled spirits taxes. The Revenue Law makes such unpaid taxes a first lien upon the still (Rev. Stat. 3251).

It is further to be noted that no claim was filed in [73] the Estate by the State Officers, they seeking the remedy (as disclosed by their petition) of forfeiture of the still by the State Courts.

A complete determination therefore required the presence of the Collector of Internal Revenue before the Referee. To do otherwise would both defeat the inherent power of the sovereignty over taxes, and subject it without its consent to the jurisdiction of the State Courts.

See: United States vs. Western Fruit Growers, 34 FS 794, D. C., So. Dist. Calif.)

II.

The Appeal Is Premature

The petition for review filed by the State Officers seeks to review what is no more than an interlocutory order of the Referee. Under such situation as disclosed in the Referee's Certificate no appeal will be allowed until a final order is made.

Pearson vs. Higgins, 32 F. 2(d) 27, 28.

See also *In re California Pea Products*, 37 Fed. Supp. 658, 660.

Respectfully submitted,

WM. FLEET PALMER

United States Attorney

WALTER M. CAMPBELL

Assistant United States
Attorney

Received copy October 21, 1941.

J. ALBERT HUTCHINSON

[Endorsed]: Filed Oct. 21, 1941. [74]

United States District Court, Southern District of
California, Northern Division

No. 5186

In the Matter of

GEORGE HUGO MALTER,

Bankrupt.

ORDER

The court is of the opinion that the findings of the referee are supported by the statement of the evidence presented to the court in the referee's cer-

tificate and report. Said findings are adopted by the court.

It is, therefore, ordered that the petition of George M. Stout as State Liquor Administrator of the State of California and Luther M. Say as Chief Liquor Control Officer of District D of the State Board of Equalization be and it is hereby denied as to the prayer for reversal of the referee's orders and that said petitioners' prayer be and it is denied as to subdivisions 3, 4, 5 and 6 thereof.

It is further ordered that the order of the referee for injunction be and it is hereby modified as follows: said Board of Equalization of the State of California, its officers, agents, employees and attorneys are, and each of them is, enjoined and restrained from in any manner enforcing or attempting to enforce the provisions of the Alcoholic Beverage [75] Control Act of the State of California (Statutes 1935, Chapter 330, as amended) against the estate of George Hogo Malter, bankrupt, and its trustee, Bert M. Green; without prejudice, however, to the filing by the Board of Equalization of any claim for any license fees which such Board may deem advisable to present as a claim for expenses of administration incurred by the trustee in the course of administration of the bankrupt estate.

Dated: November 22, 1941.

C. E. BEAUMONT

United States District Judge

[Endorsed]: Filed Nov. 22, 1941. [76]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Bert M. Green, Trustee for George Hugo Malter, Bankrupt; and

To Frank C. Lerrigo, Esq., his attorney:

You and Each of You Will Please Take Notice, and You Are Hereby Notified, that George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, do, and each of them does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Judgment entered in the above-entitled court and dated November 22, 1941, denying the Petition of George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization for Review of Order of Referee, filed on or about June 21, 1941, as to subdivisions (3), (4), (5) and (6) of the [77] prayer in said petition of said petitioners, and modifying those certain orders of the Referee in Bankruptcy of the above-entitled court in the above-entitled proceeding, dated respectively April 18, 1940, October 26, 1940 and June 12, 1941, and continuing in effect said orders in so far as the same restrain said petitioners and the State Board of Equalization of the State of California, its of-

ficers, agents, employees and attorneys from in any manner enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes 1935, Chapter 330, as amended) against the estate of the bankrupt above named and the trustee thereof, Bert M. Green, without prejudice, however, to the filing by said Board of a claim for license fees as expenses of administration of said estate; and from the whole of said Order and Judgment.

Reference is hereby made to:

- (1) Said Order and Judgment;
- (2) The Certificate and Report of Referee on Petition of George M. Stout, as State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization to Review Order of Referee;
- (3) Said Petition of George M. Stout, as State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization for Review of Order of Referee;
- (4) Said Orders of said Referee;

heretofore filed herein, and the same are and each of them is hereby by such reference made a part hereof for all purposes with the same force and effect as though the same were herein set forth at length.

Dated: December 18, 1941.

EARL WARREN

Attorney General of the
State of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M.
Stout and Luther M. Say

JAH:YC 12-18-41

[Endorsed]: Filed Dec. 20, 1941. Mailed copy to Atty. for Trustee, Appellee, 12/22/41. ELS. Mailed copy to U. S. Atty. 2/18/42, E.L.S. [78]

AFFIDAVIT OF SERVICE BY MAIL

State of California

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrigo the attorney of record of the trustee, Bert M. Green, for the above-named bankrupt, maintains an office at Pacific Southwest Bldg. in Fresno County of Fresno State of California; and between said two places there is a regular communication by mail; on the

18th day of December, 1941, I served a true copy of the Notice of Appeal herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

YOLANTHE CANTRELL

Subscribed and sworn to before me, this 18 day of December, 1941.

CHAS W. JOHNSON

Deputy Attorney General

[Endorsed]: Filed Dec. 20, 1941. [79]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE RECORD
ON APPEAL.

Now Come George M. Stout and Luther M. Say, as State Liquor Administrator of the State of California and Chief Liquor Control Officer of District D of the State Board of Equalization, respectively, appellants herein, and designate the portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

1. Petition for Review of Order of Referee, including exhibits as follows:
 - A. Petition for Restraining Order and Order to Show Cause
 - B. Restraining Order and Order to Show Cause [80]
 - C. Motion to Dismiss
 - D. Notice of Motion to Dismiss
 - E. Stipulation dated May 11, 1940
 - F. Order Denying Motion to Dismiss and Order Continuing Restraining Order
 - G. Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout and Luther M. Say for Release and Delivery of Possession of a Certain Distilled Spirits Still
 - H. Answer of Bert M. Green, Trustee, to Petition of George M. Stout and Luther M. Say for Release and Delivery of Possession of Distilled Spirits Still
 - I. Stipulation dated May 24, 1941
 - J. Order on Petition for Restraining Order and Order to Show Cause, Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout, et al. for Release and Delivery of Possession of a Certain Distilled Spirits Still
2. Certificate and Report of Referee on Petition of George M. Stout and Luther M. Say, etc.,

to Review Order of Referee (Dated July 23, 1941)

3. Notice of Filing of Certificate and Report of Referee

4. Notice of Time and Place of Hearing Upon Certificate for Review

5. Order and Judgment of Court November 22, 1941

6. Notice of Appeal

7. Bond on Appeal

8. Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal

Dated: January 19, 1942

EARL WARREN

Attorney General of the
State of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for Appellants

[Endorsed]: Filed Jan. 20, 1942. [81]

AFFIDAVIT OF SERVICE BY MAIL**Matter of Malter—Bankrupt****USDC****No. 5186**

State of California

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrigo the attorney of record of the trustee, Bert M. Green, for the bankrupt maintains an office at Pacific Southwest Bldg. in Fresno County of Fresno State of California; and between said two places there is a regular communication by mail; on the 19th day of January, 1942, I served a true copy of the Designation of Portions of Record, etc. to be Contained in Record on Appeal herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

HELEN MOUAT

Subscribed and sworn to before me, this 19 day of January, 1942

WALTER H. ROUNTREE

Deputy Attorney General

[Endorsed]: Filed Jan. 20, 1942. [82]

[Title of District Court, and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

CS# 5186 in Bankruptcy

Whereas, Petitioners George M. Stout, State liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, are about to appeal to the Circuit Court of Appeal for the Ninth Circuit from an order and judgment entered in said action on the 22nd day of November, 1941, in the District Court of the United States for the Southern District of California, Northern Division.

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellants that said Appellants will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate

seal to be hereto affixed this 31st day of December, 1941.

NATIONAL AUTOMOBILE
INSURANCE COMPANY

[Corporate By FRED W. WEITZEL
Seal] Attorney-in-Fact

State of California,
County of Los Angeles—ss.

On this 31st day of December, in the year 1941, before me, Helengene Duffin, a Notary Public in and [83] for said County and State, personally appeared Fred W. Weitzel known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal] HELENGENE DUFFIN

Notary Public in and for said County and State.

My commission expires Dec. 2nd, 1945.

[Endorsed]: Filed Dec. 31, 1941. [84]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 84 inclusive contain full, true and correct copies of: Certificate of Referee on Review; Motion to Dismiss Petition of Trustee for Restraining Order; Stipulation Dated May 11, 1940; Order of Referee Denying Motion to Dismiss; Petition for Review with Exhibits A, B, C, D, and F thereof; Notice of Filing Certificate on Review; Notice of Time and Place of Hearing and Affidavit of Service; Special Appearance of the United States; Order of District Judge upon Petition for Review; Notice of Appeal and Affidavit of Service; Designation of Record on Appeal and Affidavit of Service; Bond for Costs on Appeal; which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$15.35, which amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 24th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN

Clerk,

By: EDMUND L. SMITH

Deputy.

[Endorsed]: No. 10068. United States Circuit Court of Appeals for the Ninth Circuit. George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, Appellants, vs. Bert M. Green, Trustee of the Estate of George Hugo Malter, Bankrupt, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed February 25, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Judicial Circuit

No. 10,068

(On Appeal from Judgment of District
Court, Southern District, Northern Di-
vision—No. 5186, “Matter of Malter, Bank-
rupt.”)

GEORGE M. STOUT, State Liquor Administrator
of the State of California, and LUTHER M.
SAY, Chief Liquor Control Officer of District
D of the State Board of Equalization of the
State of California,

Appellants,

v.

BERT M. GREEN, Trustee of the Estate of George
Hugo Malter, Bankrupt,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL, AND DESIGNATION OF PARTS
OF RECORD TO BE INCLUDED IN REC-
ORD ON APPEAL

Now Come appellants, George M. Stout, as State
Liquor Administrator of the State of California,
and Luther M. Say, as Chief Liquor Control Offi-
cer of District D of the State Board of Equaliza-
tion of the State of California, and state that their
appeal is from the whole of the final judgment given,

made and entered in the above-entitled cause on the 22nd day of November, 1941, and that appellants will rely on their appeal herein on the following points:

I.

That the United States District Court, Southern District, Northern Division, erred in finding that the findings of the Referee are supported by the statement of the evidence presented to the court in the Referee's Certificate and Report.

II.

That said court erred in adopting as its findings the findings of the Referee.

III.

That said court erred in making and entering as its final judgment herein that the petition of George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, be denied as to the prayer for reversal of the orders of the Referee, and that said petitioners' prayer be denied as to Subdivisions 3, 4, 5 and 6 of their said petition.

IV.

That said court erred in making and entering as its final judgment herein that said State Board of Equalization of the State of California, its officers, agents, employees and attorneys are and each of

them is enjoined and restrained from in any manner enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes of California, 1935, Chapter 330, as amended) against the Estate of George Hugo Malter, Bankrupt, and its trustee, Bert M. Green; without prejudice, however, to the filing by the said State Board of Equalization of any claim for any license fees which said Board may deem advisable to present as a claim for expenses of administration incurred by the trustee in the course of administration of the bankrupt's estate.

V.

That said court erred in not finding that the orders made and entered herein by and through Honorable Samuel F. Hollins, Referee in Bankruptcy, dated April 18, 1940, October 26, 1940, and June 12, 1941, respectively, were and each of them is against law in that—

(a) It is not a proper proceeding for injunctive relief of the nature granted by said orders;

(b) An adequate remedy at law exists on the purported claims and causes of action set forth in said petition;

(c) There is an insufficiency of evidence to support the findings of said Referee and to support said orders.

VI.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that said orders denied to petitioners, as officers of the State of California, leave to commence appropriate actions in the courts of the State for the purpose of determining and enforcing a forfeiture occurring by (a) the unlawful possession by said bankrupt prior to the attaching of jurisdiction of the court herein, and (b) the unlawful possession by said trustee as trustee herein.

VII.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that said orders restrain petitioners, as officers of the State of California, from the enforcement of a public penal statute of the State of California enacted for the public benefit.

VIII.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that said orders restrain petitioners, as such officers, from the enforcement of penal laws respecting the unlawful possession of an unlicensed still.

IX.

That said court erred in not finding and concluding, and in not making and entering as its final

judgment herein, that said orders authorize and direct said trustee to violate the penal provisions of the Alcoholic Beverage Control Act of the State of California (Statutes of California, 1935, Chapter 330, as amended) and the provisions thereof imposing a tax for the privilege of possessing a distilled spirits still.

X.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that each and every, all and particular, the relief prayed for in petitioners' Petition for Review of Order of Referee—contained on page 66 of this Transcript of Record on Appeal, paragraphs I to VII, inclusive thereof—be granted.

XI.

Appellants hereby designate to be included in and to constitute the record on appeal in said cause all of the pleadings, orders and documents referred to in that certain "Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal", heretofore filed by appellants in the District Court of the United States, Southern District of California, Northern Division, in the proceeding entitled "In the Matter of George Hugo Malter, Bankrupt", numbered therein 5186, and contained on page 80 of this Transcript.

Dated : February 27, 1942.

EARL WARREN

Attorney General of the
State of California

J. ALFRED HUTCHINSON

Deputy Attorney General

WALTER H. ROUNTREE

Deputy Attorney General

Attorneys for Appellants

[Endorsed]: Filed Feb. 27, 1942. Paul P. O'Brien,
Clerk.